

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of

Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
(Cross Plains, Texas et al.) )

MM Docket No. 98-198  
RM - 9304

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**RESPONSE TO MOTIONS TO STRIKE**

First Broadcasting Management, L.L.C., WBAP/KSCS Operating, Ltd., Blue Bonnet Radio, Inc., Hunt Broadcasting, Inc., Gain-Air, Inc. and KCYT-FM License Corp. (collectively the "Joint Parties") hereby file their response to the *Motion to Strike the Reply to Opposition to the Joint Motion to Strike*, and the *Motion to Strike the Reply to Motion for Leave to Supplement Record and Second Supplement to Counterproposal*, filed in the above-captioned proceeding by Wagonwheel Broadcasting of Santa Anna ("Wagonwheel") on February 24, 1999 and March 8, 1999, respectively. Wagonwheel based each its motions on an incorrect section of the Commission's rules, and therefore improperly claimed that a filing deadline existed for the pleadings filed by the Joint Parties. Contrary to Wagonwheel's position, the Commission's rules do not provide a deadline for the filings objected to by Wagonwheel, and longstanding Commission case law indicates that the Commission may accept such filings at its discretion. In support hereof, the Joint Parties state as follows:

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List A B C D E

## I. DISCUSSION

### A. Section 1.45(b) of the Commission's Rules Does Not Apply to the Filing of Supplemental Comments in Table of Allotments Rule Making Proceedings.

1. Without reference to any Commission precedent, Wagonwheel simply asserts in its filings that Section 1.45(b) of the Commission's Rules, which sets a 5 day deadline for the filing of certain reply pleadings, governs filing deadlines in this proceeding. Based on this notion, and with no support, Wagonwheel then contends that the *Reply to Opposition to Joint Motion to Strike* and the *Reply to Motion for Leave to Supplement Record and Second Supplement to Counterproposal* submitted by the Joint Parties were untimely filed and should therefore be stricken from the record in this proceeding. Wagonwheel is wrong.

2. Section 1.45 is the most general of the Commission's rules that deals with the filing deadlines for pleadings. By its terms, it governs the deadlines for submission of pleadings "*except as otherwise provided in [47 C.F.R.] . . .*" 47 C.F.R. § 1.45 (emphasis added). The note following the rule states this same concept in a slightly different manner: "[w]here specific provisions contained in part 1 conflict with this section, those specific provisions are controlling." In short, where a more specific rule provision dealing with filing deadlines exists, as one does for rule making proceedings, the Commission will follow the specific rather than the general rule.

3. Because this case is a Table of Allotments rule making proceeding, it is clear that the Commission's rules governing rule making proceedings, contained in Part 1, Subpart C of 47 C.F.R. (§ 1.398 *et seq.*), would apply. Unlike Wagonwheel's bald assertion, this interpretation of the regulations finds support in the record. The Commission has consistently and without exception evaluated the acceptance of pleadings filed in Table of Allotments proceedings using the procedural

rules governing *rule making* proceedings in Subpart C of Part 1 of 47 C.F.R. and not by the filing period set forth in 1.45(b). See, e.g., *Rapid City, South Dakota*, 5 FCC Rcd 1033, n.1 (1990) (rejecting unauthorized pleadings under 1.415(c)); *Christiansted, Virgin Islands*, 10 FCC Rcd 8078, n.1 (1995); *Fairmont, North Carolina, Andrews, Charleston, Elloree, Estill, Little River, and Sullivan's Island, South Carolina*, 6 FCC Rcd 4285, n.8 (1991); *Bourbon and Columbia, Missouri*, 6 FCC Rcd 250, n.3 (1991); *Brenham, Round Rock, Austin, Caldwell, Belton, Killeen, Brownwood, West Lake Hills, and Temple, Texas*, 3 FCC Rcd 2495, n.4 (1988); cf. *Corinth, Hadley and Queensbury, New York*, 2 FCC Rcd 3316, n.3 (1987).<sup>1</sup> Wagonwheel's argument that Section 1.45 should apply to pleadings filed in this proceeding flatly ignores this well-established practice.<sup>2</sup>

**B. Section 1.415(d) of the Commission's Rules Indicates That Commission Has the Discretion to Accept Supplemental Comments in a Rule Making Proceeding, Regardless of When Such Pleadings Are Filed.**

4. Section 1.415(d) of the Commission's Rules reads as follows: "No additional comments may be filed unless specifically requested *or authorized* by the Commission." 47 C.F.R. § 1.415(d) (emphasis added). The plain language of this regulation indicates that the Commission

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1. In *Corinth, supra*, the Commission noted that the original reply period set forth in the NPRM was automatically extended to a later reply period established by the Public Notice which announced the acceptance of a Counterproposal. Here, the Public Notice for the Joint Parties Counterproposals has not yet been issued. Thus, there will be another opportunity for additional pleadings. Accordingly, the record here is not yet closed and all supplemental pleadings can still be considered as a matter within the Commission's discretion.
  2. It is not unusual for the Commission to have separate filing deadlines for rule makings which do not follow the general rule for non rule making proceedings. For example, Section 1.106 of the Commission's Rules addresses the filing of petitions for reconsideration generally, while Section 1.429 sets specific rules for such filings in rule making proceedings.

retains the discretion to authorize and accept the filing of supplemental comments, such as the Joint Parties' filings, in a rule making proceeding.

5. Section 1.415 mandates no deadline for the filing of such supplemental comments. Other subsections of this rule specify the existence of deadlines for the filing of comments and reply comments, *see* § 1.415(b), (c). Nowhere does the rule set time limits on the filing of other pleadings. Reading Section 1.415 as a whole leads to the conclusion that the Commission intended to create deadlines for the filing of certain types of pleadings, but decided against setting deadlines for the filing of other types of pleadings.

6. One recent Table of Allotments decision clearly demonstrates the discretion allowed by the Commission where the acceptance of supplemental pleadings in rule making proceedings is concerned. In *Healdton, Oklahoma and Krum, Texas; Pauls Valley and Healdton, Oklahoma*, 14 FCC Rcd \_\_\_\_, (released March 12, 1999) MM Docket Nos. 98-50, 98-75 (DA 99-493), the Allocations Branch chose not to accept supplemental comments filed by the petitioner in one of the two combined dockets. *See id.* n.2. The same petitioner filed largely the same supplemental comments in the other docket and the Branch chose to accept them because "the proposal is unopposed and in the interest of having before us a complete record." *Id.* n.4. In short, the Commission, or in this case, the Branch, may accept supplemental comments whenever it believes that doing so will assist in resolving the proceeding. The timing of such filings is irrelevant.<sup>3</sup>

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3. Even if the Commission contravenes its long-established practice and finds that Section 1.45 does apply, which it should not, the Commission should give the joint parties the benefit of the longer filing deadline in Part 1, Subpart C. Where good faith confusion exists concerning a filing deadline, the Commission allows the parties the *longer* opposition and reply time periods. For example, in *Metropolitan Fiber Systems, Order on Reconsideration*, 12 FCC (continued...)

**C. The Joint Parties Had No Involvement with the Decision by ALALATEX to Withdraw its Expression of Interest from this Proceeding; Such Withdrawals Are Specifically Contemplated by the Commission's Rules, and Do Not Constitute an Abuse of Process**

7. In its *Motion*, Wagonwheel also objects to the decision by ALALATEX to withdraw its expression of interest in the Cross Plains, TX allotment. Although its precise objection is less than clear, Wagonwheel appears to contend that ALALATEX's "sudden disappearance" from the proceeding "suggests [a] pattern of abuse" of the Commission's processes, and even more oddly, Wagonwheel seems to contend that the Joint Parties had some connection to the withdrawal.

8. As an initial matter, the Joint Parties wish to state, as they have stated in a previous pleading, that they have had no communication with ALALATEX concerning the latter's withdrawal from this proceeding, and did not have any involvement with ALALATEX's decision to withdraw. Wagonwheel provides no argument or evidence to support this claim. Wagonwheel's carefully worded implication that any of the Joint Parties had some involvement in the withdrawal without providing even a scintilla of evidence is unprofessional and irresponsible. Such unsupported contentions place doubt on Wagonwheel's credibility.

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3. (...continued)

Rcd 6901 (1997), petitioner Metropolitan Fiber Systems ("MFS") filed a petition for reconsideration under Section 1.429, which governs such filings in rule making proceedings. The Commission concluded that MFS should have filed under Section 1.106, which allows 10 days for the filing of replies, rather than the 15 days permitted under Section 1.429. Even so, the Commission found that MFS' error was harmless, and stated that "[a]ny opposition or reply filed in this proceeding is considered timely filed, provided that, such pleadings complied with the time periods for Section 1.429 . . . ." Therefore, since the Joint Parties made a good faith effort to determine whether there was a filing deadline and found no precedent for applying Section 1.45, the Commission should allow the Joint Parties the same latitude that was given Metropolitan Fiber Systems in the cited case.


9. Although the Joint Parties had nothing to do with the ALALATEX withdrawal, they would like to offer some comments on the propriety of that withdrawal, since Wagonwheel has raised the issue. Wagonwheel's claim that the ALALATEX withdrawal is somehow "indicative of abuse" ignores the fact that Section 1.420(j) of the Commission's rules sets the requirements for effecting *exactly this type of withdrawal*. Wagonwheel has presented no evidence that ALALATEX's withdrawal failed to meet these requirements. If a Commission rule exists governing withdrawals of expressions of interest in Table of Allotments rule makings, and ALALATEX complied with that rule, where is the abuse? The only reasonable answer to this question is in Wagonwheel's very active imagination.

## **II. CONCLUSION**

10. For the reasons stated above, the Joint Parties hereby request that the Commission DENY Wagonwheel's *Motion to Strike*, and include in the record for this proceeding the *Reply to Opposition to Joint Motion to Strike* and the *Reply to Motion for Leave to Supplement Record and Second Supplement to Counterproposal* filed by the Joint Parties.

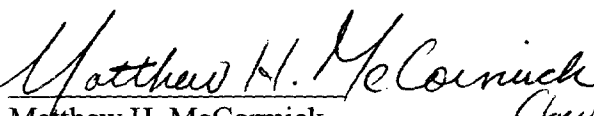
Respectfully submitted,

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4. Please note the office address change for future service of pleadings.

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March 18, 1999



### CERTIFICATE OF SERVICE

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